IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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No. 78-872

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ATCHISON, TOPEKA & SANTA FE RAILWAY CO., et al,

Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., et al.,

Respondents.

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## BRIEF OF RESPONDENT INSTITUTE OF SCRAP IRON AND STEEL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes:** Page





**Miscellaneous:** Page

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## STATEMENT

Respondent, Institute of Scrap Iron and Steel, Inc. is a non-profit trade association incorporated in the state of New York with its principal offices in Washington, D. C. Institute members process, ship and otherwise handle approximately 90% to 95% of the iron and steel scrap purchased in the United States.

Petitioners seek a writ of certiorari to review a unanimous decision of the United States Court of Appeals for the District of Columbia, vacating and remanding for further proceedings the February 1, 1977 report and order of the Interstate Commerce Commission in *Ex Parte No. 319*.[1] In that order three commissioners, including the current chairman and the past vice chairman, registered strong dissents[2] to the five-member majority opinion. Thus, six of the eleven judicial officers who have reviewed the case have found error in the majority's order.

Significantly, the United States Department of Justice, which traditionally represents the administrative agency and had never previously supported scrap shippers, abandoned the Commission and filed with the Court of Appeals a brief in favor of Respondent, requesting that the Commission's order be vacated and remanded. Additionally, the Environmental Protection Agency and the Federal Energy Administration opposed the Commission's order.

If the substantial opposition (other than that of Respondent) to the Commission's order is not enough to deny the petition for writ, two additional cogent reasons exist:

1. The Interstate Commerce Commission itself does not seek a writ of certiorari[3], and

[1] 356 I.C.C. 114 (Pet.App. D.).

[2] 356 I.C.C. 432 (Pet.App. 322d).

[3] Petitioners' claim that the requirement that the remand be completed within six months constitutes grounds for granting a writ of certiorari. However, the Commission's decision not to seek a writ can be interpreted as a lack of concern by the Commission regarding the six month deadline. In any event, the order to complete the remand in six months is not a matter of such great public interest as would warrant review by this Court.



2. The assailed opinion of the Court of Appeals is not ripe for review since the case has been remanded for further proceedings.[4]

## ARGUMENT

### I. Events Prior to Ex Parte No. 319.

On February 5, 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976.[5] Section 204 of the Act reflected Congress's continuing and accelerating concern for conservation of rapidly dwindling natural resources, reduction of pollution and conservation of energy, in that it directed the Interstate Commerce Commission to investigate the rate structures for recyclable materials and competing virgin materials in order to determine if they were unjustly discriminatory or unreasonable. Section 204 was one of the many bricks in the complex Congressional structure involving numerous governmental agencies in the critical areas of conservation, environment and energy.[6]

[4] *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384; *Cobbledick* v. *United States*, 309 U.S. 323, 324-325; *Hamilton-Brown Shoe Co.*, v. *United States*, 240 U.S. 251, 258 and *Brotherhood of Locomotive Firemen* v. *Bangor & Arroostook R.R.*, 389 U.S. 327.

[5] Pub.L. 94-210, 90 Stat. 40 (Pet. App. F).

[6] E.g., National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852; the Solid Waste Disposal Act, Pub. L. 89-272, 79 Stat. 997; the Resource Recovery Act of 1970, Pub. L. 91-512, 84 Stat. 1227; the Clean Air Act and the Clean Air Act Amendments of 1970, Pub. L. 89-675, 80 Stat. 954, and Pub. L. 91-604, 84 Stat. 1676, Title 42, U.S.C. §§ 1857-1871; the Federal Water Pollution Control Act, Pub. L. 92-500, 86 Stat. 816, Title 33 U.S.C. § 1151 *et seq.*; the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871; the National Materials Policy Act of 1970, Pub. L. 91-512, 84 Stat. 1234, the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 90 Stat. 2795; and the Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246.

For many years a number of Federal agencies had complained that freight rates discriminated against the transportation of recyclable materials in favor of virgin commodities, thereby creating a significant barrier to increased recycling.[7]

Indeed on several occasions, the Commission had recog-

[7] E.g., "Recycling offers a significant potential for energy and resource conservation in a number of important industries. However, shipping rates that discriminate against transport of recycled materials in favor of virgin materials are a significant barrier to increased recycling . . .". Federal Energy Administration, Office of Conservation and Environment, Report to Congress: Energy Conservation Study, December, 1974, p. 157.

"Certain railroad freight rates appear to discriminate against secondary materials in favor of virgin materials." Final Report of the National Commission on Materials Policy, June, 1973, p. 4D-17.

During the Congressional deliberations prior to the enactment of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 1023, Senator Moss stated:

> ". . .(T)he record before the Commerce Committee shows that since 1968, agency after agency of the executive branch has urged the Interstate Commerce Commission and the Federal Maritime Commission to correct the unreasonable, discriminatory transportation rates for recyclable commodities such as scrap metals, waste paper and textile wastes.
>
> "The Secretary of the Interior, the Department of Commerce, the Director of the Office of Emergency Planning, the General Services Administration, the Council on Environmental Quality, the Environmental Protection Agency, the Citizens Advisory Committee on the Environment, the National Materials Policy Commission, and the National Science Foundation have all called for the elimination of the unreasonable and discriminatory freight rates which have impeded effective recycling and have drained our scarce stock of critical natural resources.
>
> "At the local level the National League of Cities, the U.S. Conference of Mayors, the Council of State Governments, and the League of Women Voters have sought the same relief from the Federal Government contending that unreasonable, discriminatory freight rates for the transportation of recyclables are discouraging recycling and making it more and more difficult and costly for local governments to manage and dispose of their expanding volumes of solid waste materials." 119 Cong.Rec. 40724.



nized the competition between the recyclable scrap iron and the virgin material iron ore by granting rate relief during general freight rate increase cases.[8] But, inconsistently, the Commission denied rate relief for recyclables in numerous other general freight rate increase cases.[9]

Congressional disenchantment with the Commission's failure to take more positive action to eliminate the disparity in freight rates between virgin and recyclable commodities was first manifested on January 2, 1974 when the Regional Rail Reorganization Act of 1973 was enacted.[10] Section 603 of the Act admonishes the Commission to "by expedited proceedings, adopt appropriate rules

[8] See *Ex Parte No. 256, Increased Freight Rates, 1967*, 332 I.C.C. 280, 331, where the Commission ordered the increase on scrap iron freight rates to be "held to those permitted on iron ore in view of the competition, shown on the record, between these commodities"; *Ex Parte No. 259, Increased Freight Rates, 1968*, 332 I.C.C. 714, 743, where the increase on scrap iron freight rates was held to the increase granted iron ore; *Ex Parte No. 265 and Ex Parte No. 267, Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 207, where scrap iron rates in the east were increased by 11% while iron ore rates were increased 14% because of "environmental considerations"; *Ex Parte No. 295 (Sub-No. 1), Increased Freight Rates and Charges, 1973*, 349 I.C.C. 250, 279, where scrap iron freight rates were granted a holddown equal to the holddown on iron ore rates to "remove any possible risk that the increase may retard movements of ferrous scrap"; and *Ex Parte No. 310, Increased Freight Rates and Charges, 1975*, 349 I.C.C. 555, where scrap iron rates were again granted a holddown in cents per ton equal to the average increase on iron ore rates to "generate a degree of positive environmental benefits." The Commission added that "as virgin counterparts are allowed to increase incrementally, recyclables will be placed in a more favorable economic posture." 349 I.C.C. 555 at 578.

[9] *Ex Parte No. 262, Increased Freight Rates, 1969*, 337 I.C.C. 436; *Ex Parte No. 281, Increased Freight Rates and Charges, 1972*, 341 I.C.C. 290; *Ex Parte No. 303, Increased Freight Rates and Charges, 1974, Nationwide*, 349 I.C.C. 862; *Ex Parte No. 305 RE, Increased Freight Rates and Charges, 1975 — Recyclable Materials*, (unreported); *Ex Parte No. 313, Increased Freight Rates and Charges — Labor Costs — 1975* (unreported).

[10] Pub.L. 93-236, 87 Stat. § 1023, 45 U.S.C. § 793.

. . . which will eliminate discrimination against the shipment of recyclable materials in rate structures and in other Commission practices where such discrimination exists."

The Commission's response to § 603 was to enact redundant rules, adding little to those already incorporated in the Interstate Commerce Act, prompting a strong dissent from Commissioner O'Neal.[11]

The enactment by Congress of § 204 of the Regulatory Reform Act some eighteen months following *Ex Parte No. 306* was a second, more strongly worded directive to the Commission to act promptly to eliminate the discriminatory freight rate structure on recyclables.

## II. The Ex Parte No. 319 Order Contains Numerous Reversible Errors.

The three dissenting Commissioners, the Court of Appeals and the Department of Justice all detected errors in the order of the majority in *Ex Parte No. 319*.

Section 204 (a) (2) of the Regulatory Reform Act imposed upon the rail carriers the burden of proof that the rate structure on competing recyclables and virgin materials was just, reasonable and nondiscriminatory. Petitioners state that the Interstate Commerce Commission clearly and repeatedly recognized that the railroads had

[11] Commissioner O'Neal complained: "The lack of specific requirements in the statute is read by the majority (according to the report) to indicate that the Commission need not undertake a broad investigation. But the Congress had indicated that this is an area of sufficient Congressional concern to warrant a statutory message to the Commission. This suggests to me that Congress wanted the Commission to do something more than merely reaffirm that upon the filing of a formal complaint a remedy for discrimination exists at the I.C.C." *Ex Parte No. 306*, 346 I.C.C. 408 at 414. Commissioner Murphy joined in the dissent.



the burden of proof and that the Court of Appeals disagreed with the factual evaluation of the rates.[12]

The Commission's order indicates otherwise. On numerous occasions it criticized the carriers for improper evidence and failure to furnish adequate evidence.[13] More importantly the Commission improperly chastised the shippers for failing to fill the void created by the railroads' lack of evidence, prompting Commissioner Christian to complain that "In practical effect, the report has lifted the statutory burden of proof from the carriers and placed it on the shippers." 356 I.C.C. 433 (Pet.App. 323d).

Petitioner's assertion that the Court of Appeals conceded that the Interstate Commerce Commission had acted properly in applying traditional standards of reasonableness and discrimination but improperly disagreed with the Commission's factual evaluation of the rates, is incorrect. What the Court of Appeals found was that by reversing the rules governing the burden of proof, § 204 precluded the Commission from following the rules applicable during general revenue proceedings requiring that the railroads establish their revenue needs following which the burden shifts to the shippers to show the increases are not justified.

Repeatedly the Commission erroneously stated it would consider the revenue needs of the carriers before making

[12] Pet. pgs. 9-10.

[13] See e.g., 356 I.C.C. 134, (Pet.App. 24d) where the Commission stated "All respondents failed to show comparisons of results for recyclable commodities with their competing or potentially competitive virgin commodities." See also 356 I.C.C. 133 (Pet.App. 23d) where additional specific "failure" or "improper" determinations were found by the Commission. Of the 3,000 movements referred to by Petitioners on page 6 of their petition, over 875 had to be discarded because they were improper. 356 I.C.C. 127 (Pet.App. 17d).

any rate adjustments.[14] The Court of Appeals properly found it was not for the Commission to disagree with Congress by giving greater weight to railroad profitability than to environmental and energy goals. Slip Op. 24-25.[15]

Nor does the action by the Court of Appeals parallel that of the SCRAP litigation[16] as Petitioners contend.[17] *SCRAP II* was an appeal from a three-judge Federal court setting aside a Commission order terminating a general revenue proceeding without declaring unlawful certain increases on the basis the Commission failed to hold hearings after preparing a draft environmental impact statement, thereby violating a NEPA requirement that the statement accompany the proposal through the agency review process. This Court held under *Arrow Transportation* v. *Southern R. Co.*, 372 U.S. 658, that § 15 (7) of the Interstate Commerce Act gives the Commission exclusive power to suspend rate increases pending final determination of their lawfulness.

[14] E.g., 356 I.C.C. 160 (Pet.App. 50d). See also 356 I.C.C 118, 151, 152, 158 and 429 (Pet.App. 8d, 41d, 42d, 48d and 319d). Even in the few instances where rates were found unreasonable, the Commission evidenced its primary concern for the railroads' profitability by stating that reductions would not adversely affect their financial status. 356 I.C.C. 416 (Pet.App. 306d).

[15] Petitioners' appeal to the benevolence of this Court by asserting that the Court of Appeal's opinion "threatens vitally needed railroad revenues" is misplaced. Pet. p. 11. First, scrap iron shippers sought no rate reductions; only that in future general freight rate increases, the increases on scrap iron be held, until such time as discrimination in the basic rate structures is removed, to the average level granted iron ore in cents per ton. 356 I.C.C. 153, 163 (Pet.App 43d, 53d). Second, the rail carriers can improve their financial condition by raising the rates on marginal and non-compensatory traffic. Third, the Commission in other proceedings involving interpretation of the Regulatory Reform Act has stated "Congress intended that the railroads' need for rate flexibility be balanced against the public's need for protection against excessive rates." *Ex Parte No. 320*, Slip Sht. pp. 18, 26, App. D, p. 7.

[16] *United States* v. *SCRAP*, 412 U.S. 669 (1973) ("*SCRAP I*"); *Aberdeen & R.R.R.* v. *SCRAP*, 414 U.S. 1035 (1973); *Aberdeen & R.R.R.* v. *SCRAP*, 422 US. 289 (1975 ("*SCRAP II*").

[17] Pet. pp. 11, 21-22.



## III. The Commission Did Not Apply Traditional Rate Making Criteria.

Petitioners erroneously urge that the Court of Appeals, having admitted the Commission was authorized by § 204 to apply traditional rate making criteria, improperly reweighed the evidence and substituted its evaluation of the evidence for that of the Commission.[18] While the criteria for determining discrimination pursuant to § 3 (1) were correctly articulated by the Commission[19] a demonstration of how the Commission proceeded to investigate discrimination in *Ex Parte No. 319* discloses the Court of Appeals and the three dissenting Commissioners were correct in holding the articulated procedure was not followed.

First, although it was undisputed that there was a gross disparity on freight rates on scrap iron and iron ore such fact was never acknowledged by the Commission. It neat-

[18] Pet. p. 12-13.

[19] The Commission stated "In typical section 3(1) cases we have stated that in order to support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) the disparity in rates is not justified by transportation conditions. The complainant has the burden of proving the presence of the first three factors, and the defendants have the burden of justifying the disparity, if possible, in connection with the fourth. *Chicago Board of Trade* v. *Illinois Central R. Co.*, 344 I.C.C. 818, 831 (1973)." 356 I.C.C. 159 (Pet.App. 49d). See also *Chicago & Eastern Illinois R. Co.* v. *United States*, 384 F.Supp. 298, affd. 421 U.S. 956 (1975).

ly finessed this damaging fact by reviewing instead the ratios of revenue to variable costs of the two commodities.[20]

More importantly, as noted by the Court of Appeals and the dissenting Commissioners, the order failed to address the issue of whether the substantial rate disparities were justified by transportation characteristics. The Commission sidestepped this issue by finding that scrap iron shippers had not been injured by the higher ratios since the movement of scrap had not decreased.[21]

The finding that the movements of scrap iron had not decreased provided the basis for another Commission error. As stated earlier, one of the traditional § 3 (1) criteria is whether the shipper is competitively injured, actually or potentially.[22] Having properly enumerated this criterion, the Commission ignored it and, as the Court of Appeals found, introduced "a novel element, competition in fact," as opposed to potential competitive injury.[23]

By ruling scrap shippers did not establish discrimination by failing to show actual rather than potential injury, the

[20] Even the discussion of ratios was biased. Without explanation, the Commission abandoned the findings of the Coordinator in *Ex Parte No. 270* showing the ratios on scrap iron to be superior to those on iron ore in all territories: 124.9 to 109.4 in Official (Eastern), 163.9 to 108.2 in Southern, 127.9 to 92.8 in Western and 129.9 to 101.4 in all. *Ex Parte No. 270 (Sub-No. 6)* 345 I.C.C. 1119, 1121.

[21] Specifically the Commission stated: "There is really no need to consider if the transportation characteristics of iron ore, which differ from those of scrap iron and steel, justify the higher ratios on scrap." 356 I.C.C. 206 (Pet.App. 96d).

[22] The Commission has repeatedly held that the potential for discriminatory treatment violates §§ 2 and 3(1). *Baltimore & Ohio R. Co.* v. *United States*, 391 F.Supp. 249, 259 (1975). See also footnote 19, *supra*.

[23] Slip Op. 35 (Pet.App. 39b).



Commission vitiated its self-proclaimed § 3 (1) criteria, as well as those denominated by Congress in § 204.[24]

For § 204 does not require a positive finding of actual injury: if potential injury exists, there is discrimination and the Commission was mandated to eliminate it. The Commission's acquiescence in higher rates for recyclables so long as shipments were not reduced, frustrates the desire of Congress to increase the movement of recyclables in order to achieve conservation, environmental and energy goals.[25] Failure to adhere to statutory and procedural requirements constitutes grounds for setting aside an agency decision. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410-416 (1971).

Petitioners argue that an indication of potential injury was the utilization by the Commission of an econometric analysis of transportation demand elasticity indicating the rate structure had no significant impact on the movement of recyclables.[26] However, the Commission itself admitted

[24] The Commission admitted "that statistics on the movement of scrap iron and steel by rail does not tell the story, i.e., how much could have moved by rail." 356 I.C.C. 183 (Pet.App. 73d). The Commission noted further that "the absence of extensive evidence and discussion of the shifting of recyclable traffic from rail to motor carriage, both common and private, is a great void in this record." 356 I.C.C. 183 (Pet.App. 73d).

[25] The Commission was aware of the environmental benefits of using scrap iron as opposed to iron ore. It found "Accordingly, conversion of BOF to EAF steelmaking, which scrap utilization incentives would do, would create significant environmental benefits.

"Increasing scrap utilization thus impacts the environment, primarily by reducing the iron ore mining and processing activities in the short run rather than by changes in environmental profiles of the furnaces themselves. In the long run, substitution of the blast furnace -- BOF system with the scrap intensive EAF system would result in a more environmental efficient industry." *Ex Parte No. 319*, FEIS, p. 4-32.

[26] Pet. pgs. 15-16.

the inherent limitation of such studies when used to determine the lawfulness of the rate structures. (See Slip Op. 30, Pet. App. 34b).[27]

## IV. Certiorari is Not Warranted at This Time.

As stated earlier, the interlocutory nature of the remand precludes further review at this time. To state that this case is in substance a continuation of the prior SCRAP litigation (Pet. p. 22) is absurd. The SCRAP cases involved an interpretation of NEPA requirements in a general revenue increase proceeding. This case is a Congressionally mandated investigation in which judicial review is specifically provided in § 204 (d).[28]

All of the so-called repeated examinations of illegal rates of recyclables enumerated by Petitioners (Pet. p. 26) occurred prior to the enactment of the Regulatory Reform Act on February 5, 1976.[29] Petitioners infer that such re-

[27] The theoretical conclusions of the econometric analysis of demand elasticity were contrary to the Commission's own findings. In *Ex Parte No. 270 (Sub. No. 5)* the Commission stated "should freight rates become too high . . . capital expenditures for steel mill construction could be shifted toward investment in mills that utilize scrap as opposed to ore." 345 I.C.C. 667. In its final environmental impact statement in *Ex Parte No. 319* the Commission found "Holddowns will generally benefit recyclable materials because rates on those commodities are typically higher than the corresponding virgin material." *Ex Parte No. 270*, FEIS, January 4, 1977, p. 5-5.

[28] Pet.App. 2(f). This Court held in SCRAP II that the Commission's conclusions at the close of a general revenue proceeding that it give no further consideration to environmental factors under NEPA was a final decision subject to judicial review. *Asphalt Roofing Mfg. Assoc.* v. *I.C.C.*, 567 F.2d 994, 1001 (1977).

[29] *Ex Parte No. 270 (Sub-Nos. 5 and 6)* was instituted December 27, 1973, and although the Coordinator's report was decided February 4, 1976, it was not served until March 19, 1976. However, *Ex Parte No. 270* was a non-adversary proceeding in which "the Coordinator did not go through a structured, step-by-step analysis in determining whether the rate structures on scrap iron and steel are being discriminated against in favor of the rate structure on iron ore." 356 I.C.C. 184 (Pet.App. 74d). The *Ex Parte No. 281* order was issued September 27, 1972, the *Ex Parte No. 295 (Sub-No. 1)* order was issued October 29, 1974, 349 I.C.C. 250, and the *Ex Parte No. 299* order was issued August 15, 1975, 350 I.C.C. 673.



peated examinations should close the book on further investigation of discriminatory rate treatment of recyclables. To the contrary, it can be assumed that Congress was well aware of the Commission's repeated failures to eliminate the grossly disparate rates on recyclables and it was *because* of such failure that § 204 was enacted.

Petitioners remind this Court again on page 26 of its petition of "the railroad industry's dire financial position." This theme, which repeatedly appears throughout the Commission's order (see footnote 14) and the petition (Pet. pgs. 3-4), is seen as justification for maintaining a highly discriminatory freight rate structure. Yet, the very fact that § 204 was enacted in the thick of legislation entitled the "Railroad Revitalization and Regulatory Reform Act", indicated that to Congress, railroad revenue needs are not to be a factor in the elimination of unreasonable or discriminatory rate structures on recyclables.

The petition for writ of certiorari should be overruled.

Respectfully submitted,

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